

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Mar 15, 2024**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ARELIS VARGAS-RUIZ and  
ROBERTO MARTINEZ GONZALEZ,

Plaintiffs,

v.

LOREN K. MILLER, ALEJANDRO  
MAYORKAS, UR MENDOZA  
JADDOU, ANTONY J. BLINKEN,  
PHILLIP SLATTERY, RICHARD C.  
VISEK, WENDY R. SHERMAN,  
RENA BITTER, KEN SALAZAR,  
ERIC COHAN, and KENT MAY,

Defendants.

No. 2:23-CV-00130-MKD

ORDER GRANTING MOTIONS TO  
DISMISS

**ECF Nos. 5, 18**

Before the Court are Defendants' Motion to Dismiss or Alternatively for  
Summary Judgment, ECF No. 5, and the Stipulated Motion to Dismiss Defendants  
Loren K. Miller and Alejandro Mayorkas, ECF No. 18. The Court has reviewed  
the record and is fully informed. The Court finds oral argument is not warranted.  
*See* LCivR 7(i)(3)(B)(iii). For the reasons set forth below, the Court grants

1 Defendants' Motion to Dismiss or Alternatively for Summary Judgment, ECF No.  
2 5, and the Stipulated Motion to Dismiss Defendants Loren K. Miller and Alejandro  
3 Mayorkas, ECF No. 18.

#### 4 **BACKGROUND**

5 Plaintiffs Arelis Vargas-Ruiz (Plaintiff Vargas-Ruiz) and Plaintiff Roberto  
6 Martinez Gonzalez (Plaintiff Gonzalez) are spouses. ECF No. 1 at 9. Plaintiff  
7 Vargas-Ruiz is seeking lawful permanent residency for Plaintiff Gonzalez. *Id.*  
8 This action arises out of delays that have occurred in that process.

9 On November 5, 2014, Plaintiff Vargas-Ruiz filed a Petition for Alien  
10 Relative (Form I-130) on Plaintiff Gonzalez's behalf. ECF No. 1-1. The petition  
11 was approved on June 2, 2015.<sup>1</sup> *Id.* On October 20, 2017, Plaintiff Gonzalez filed  
12 a Provisional Unlawful Presence Waiver (Form I-601A). ECF No. 1 at 9; ECF No.  
13 1-1 at 5. The application was approved on January 25, 2018. *Id.*

14 On November 14, 2018, Plaintiffs submitted an Online Immigrant Visa and  
15 Alien Registration Application (DS-260). ECF No. 6 at 4. The same day, the  
16 National Visa Center (NVC) advised Plaintiffs that documents were missing from  
17 the Form. *Id.* at 4. On November 20, 2019, NVC inquired whether Plaintiff

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18  
19 <sup>1</sup> Defendants state the petition was approved May 28, 2015. ECF No. 6 at 3. The  
20 Court refers to the Notice date as the approval date. ECF No. 1-1 at 4.

1 Gonzalez was interested in further pursuing his application. *Id.* On July 23, 2022,  
2 Plaintiffs' attorney sent an email to NVC advising NVC of problems with making  
3 the fee payment online. *Id.* at 5. On August 26, 2022, NVC emailed Plaintiffs  
4 advising them the technical issue preventing payment had been resolved. *Id.*

5 On January 24, 2023, Plaintiffs submitted all necessary filing fees and  
6 paperwork to NVC. ECF No. 5 at 18; ECF No. 6 at 5; *see also* ECF No. 17 at 3.  
7 On May 1, 2023, 97 days later, Plaintiffs filed this Complaint. ECF No. 1.

8 On July 10, 2023, Defendants filed a Motion to Dismiss arguing that the  
9 Court lacks subject matter jurisdiction, and that Plaintiffs fail to state a claim for  
10 which relief can be granted. ECF No. 5.

### 11 **LEGAL STANDARD**

12 "A [Fed. R. Civ. P. 12(b)(1)] jurisdictional attack may be facial or factual."  
13 *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial  
14 attack, the challenger asserts that the allegations contained in a complaint are  
15 insufficient on their face to invoke federal jurisdiction." *Id.* The reviewing court  
16 is to accept the allegations as true and draw all reasonable inferences in the  
17 plaintiff's favor. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). For a  
18 factual attack, the movant challenges the veracity of the allegations. *Safe Air for*  
19 *Everyone*, 373 F.3d at 1039. "[T]he district court may review evidence beyond  
20 the complaint without converting the motion to dismiss into a motion for

1 summary judgment.” *Id.* The reviewing court is not required to accept the  
2 allegations as true. *Id.*

3 “To survive a [Fed. R. Civ. P. 12(b)(6)] motion to dismiss, a complaint must  
4 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is  
5 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*  
6 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Threadbare recitals of the  
7 elements of a cause of action, supported by mere conclusory statements, do not  
8 suffice.” *Id.* In considering a motion to dismiss for failure to state a claim, the  
9 Court must accept as true the well-pleaded factual allegations and any reasonable  
10 inference to be drawn from them, but legal conclusions are not entitled to the same  
11 assumption of truth. *Id.* A complaint must contain either direct or inferential  
12 allegations respecting all the material elements necessary to sustain recovery under  
13 some viable legal theory. *Twombly*, 550 U.S. at 562. “Factual allegations must be  
14 enough to raise a right to relief above the speculative level.” *Id.* at 555.

## 15 DISCUSSION

### 16 A. Stipulated Motion to Dismiss

17 The parties have stipulated that all claims against Defendants Loren K.  
18 Miller and Alejandro Mayorkas should be dismissed without prejudice. A plaintiff  
19 may dismiss an action without court order by filing a stipulation of dismissal  
20

1 signed by all parties who have appeared. Fed. R. Civ. P. 41(a)(1)(A)(ii). The  
2 Stipulated Motion to Dismiss is therefore granted.

### 3 **B. Standing**

4 Defendants contend Plaintiffs lack standing. ECF No. 5 at 7-9. Plaintiffs  
5 have the burden of establishing Article III standing. *Spokeo, Inc. v. Robins*, 578  
6 U.S. 330, 338 (2016). To satisfy that burden, the plaintiff must show they have  
7 “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct  
8 of the defendant, and (3) that is likely to be redressed by a favorable judicial  
9 decision.” *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). An  
10 injury in fact is an injury that is concrete and particularized. *Summers v. Earth*  
11 *Island Inst.*, 555 U.S. 488, 494 (2009). Defendants raise a factual attack,  
12 challenging the veracity of Plaintiffs’ allegations; thus, the Court is not required to  
13 accept Plaintiffs’ allegations as true and the Court may look to evidence outside of  
14 the Complaint, without converting the motion to a motion for summary judgment.  
15 *See Safe Air for Everyone*, 373 F.3d at 1039.

16 Plaintiffs have not demonstrated an injury in fact at the time Plaintiffs  
17 initiated the lawsuit. Standing is measured at the time a complaint is filed. *See*,  
18 *e.g.*, *San Luis & Delta-Mendota Water Auth. v. Dep’t of Interior*, 905 F. Supp. 2d  
19 1158, 1169 (E.D. Cal. 2012) (citing *Lujan*, 504 U.S. at 569 n.4); *Fathers &*  
20 *Daughters Nevada, LLC v. Lingfu Zhang*, 284 F. Supp. 3d 1160, 1171 (D. Or.

1 2018) (citing *Lujan*, 504 U.S. at 569 n.4). An injury in fact must be actual or  
2 imminent, not conjectural or hypothetical. *Lujan*, 504 U.S. at 560.

3 *1. Injury Due to Delay*

4 First, Plaintiffs contend they have been injured because they waited 94  
5 months for Plaintiff's DS-260 application to be scheduled and adjudicated. ECF  
6 No. 1 at 10-11. Plaintiffs assert the application should have been processed within  
7 180 days from the initial filing. *Id.* However, Defendants challenge the veracity of  
8 this allegation and contend Plaintiffs had only waited 97 days, not 94 months, prior  
9 to the filing of the Complaint. ECF No. 5 at 15-17. Plaintiffs' Form I-130 was  
10 approved on May 28, 2015, but Plaintiffs' visa application was not documentarily  
11 complete until January 24, 2023. ECF No. 5 at 17-18; ECF No. 6 at 4-5. Thus,  
12 Plaintiffs' application was not complete until 97 days prior to the filing of the  
13 lawsuit.

14 Plaintiffs concede there was not a 94-month delay but contend instead there  
15 is a 188-day delay as of the date Plaintiffs filed the Response. ECF No. 17 at 3.  
16 Plaintiffs maintain that this delay is unreasonable based on the 180-day standard  
17 set forth in 8 U.S.C. § 1571(b). *Id.* at 9. However, Plaintiffs have failed to allege  
18 an actual or imminent injury at the time of the Complaint. The crux of Plaintiff's  
19 Complaint was the allegation that a 94-month delay was their injury. ECF No. 1 at  
20 3, 9, 11. Defendants have presented evidence that Plaintiffs' allegation was

1 factually inaccurate, and Plaintiffs have conceded that fact. When the Complaint  
2 was filed, Plaintiffs' visa could still have been adjudicated prior to the 180-day  
3 standard. Thus, Plaintiffs have not alleged an actual or imminent injury at the time  
4 of the Complaint. Further, the injury due to the delay is a purely procedural harm,  
5 as discussed further *infra*.

6 *2. Injury Due to Family Separation or Other Harm*

7 Second, Plaintiffs have not demonstrated an injury that is concrete and  
8 particularized. *See Summers*, 555 U.S. at 493. Plaintiffs contend the delay in  
9 scheduling and adjudicating the visa application has caused "Plaintiffs ongoing and  
10 substantial injuries personally and emotionally due to the family separation  
11 between them and the cost of maintaining households in the U.S. and Mexico."  
12 ECF No. 1 at 11. Defendants challenge the veracity of this allegation. ECF No. 5  
13 at 8. Plaintiffs state they currently live together in Ephrata, Washington and do not  
14 allege what family they are separated from. ECF No. 1 at 5, 11. Plaintiffs'  
15 response does not present any facts to support their contention that they are  
16 separated from family. ECF No. 17 at 7. Thus, the only family members Plaintiffs  
17 discuss are Plaintiff Vargas-Ruiz and Plaintiff Gonzalez, who reside together.  
18 Plaintiffs' contention that they are separated from family is not supported by any  
19 factual allegation in the complaint or any factual basis in the briefing.

1 Plaintiff Gonzalez states that he “must continue to live his life stuck in limbo  
2 status” and the delay has caused him “serious harm.” ECF No. 17 at 5. He  
3 contends that if his immigrant visa interview were scheduled and his application  
4 were adjudicated, he would become a legal permanent resident or he would know  
5 he must take a different path to obtain lawful status. *Id.* at 6. He argues that the  
6 delay has prevented him from trying to obtain lawful status. *Id.* Plaintiffs contend  
7 that their “serious hardship” gives them standing to bring the claim. *Id.* at 7.  
8 However, Plaintiffs do not present any facts to support the contention they have  
9 experienced any specific serious hardship. Thus, Plaintiffs have not demonstrated  
10 a concrete and particularized harm due to family separation or any other alleged  
11 harm.

### 12 3. *Procedural Injury*

13 Next, Plaintiffs’ contentions amount to only a procedural violation.  
14 Plaintiffs first contended their injury was a 94-month delay, and they now contend  
15 the delay of longer than 180 days is their injury. ECF Nos. 1, 17. Article III  
16 standing requires that the plaintiffs have suffered some harm that actually exists in  
17 the world, not an abstract or merely procedural harm. *Robins v. Spokeo, Inc.*, 867  
18 F.3d 1108, 1112 (9th Cir. 2017).

19 As discussed *supra*, Plaintiffs do not allege that the procedural delay has  
20 caused Plaintiffs any specific harm. For example, in *Filazapovich*, the plaintiffs



1 had standing when the cessation and deprioritizing of DV-2021 visa adjudications  
2 put the plaintiffs at an increased risk of losing their procedural right to have their  
3 applications adjudicated that year. *Filazapovich v. Dep't of State*, 560 F. Supp. 3d  
4 203, 226-27 (D.D.C. 2021). The plaintiffs demonstrated that even with the delays  
5 caused by the pandemic, they would have been substantially likely to receive their  
6 visas that year but for the defendants' allegedly unlawful actions. *Id.* In *Ortiz*, the  
7 plaintiffs had standing when a family faced immediate, irreparable harm due to the  
8 prospect of losing the chance to immigrate together, because the failure to expedite  
9 the process within six months would cause plaintiff's son to be too old to be a  
10 beneficiary to plaintiff's petition. *Ortiz v. Dep't of State*, No. 1:22-CV-00508-  
11 AKB, 2023 WL 4407569, at \*3 (D. Idaho July 7, 2023). In *Jacob*, the plaintiff had  
12 standing when plaintiff's visa category was more adversely impacted, causing a  
13 bigger backlog and delay for their category of visas, which the Court found was a  
14 cognizable injury. *Jacob v. Biden*, 542 F. Supp. 3d 938, 951 (N.D. Cal. 2021). In  
15 a case where the plaintiff was separated from his family, and he then required  
16 treatment for depression, the plaintiff had standing. *R. v. USCIS*, No.  
17 223CV05460DDPASX, 2023 WL 9197564, at \*1 (C.D. Cal. Dec. 6, 2023).

18 Here, Plaintiffs do not contend that their category of visa was more  
19 adversely impacted, nor do they point to any concrete injury regarding the alleged  
20 injury due to the delay. While Plaintiffs generally state they are separated from

1 family, they do not offer factual allegations to support the theory and do not  
2 contend any specific family members are impacted by the delay. As such,  
3 Plaintiffs' allegation that the delay has exceeded 180 days and the delay has  
4 generally harmed them is insufficient—Plaintiffs have failed to demonstrate a real,  
5 as opposed to a purely legal alleged harm. Plaintiffs thus have not met their  
6 burden in demonstrating they have standing. Defendants' Motion to Dismiss is  
7 therefore granted.

### 8 **C. Failure to State a Claim and Plaintiffs' Delay**

9 Defendants contend Plaintiffs have failed to state a claim and contend  
10 Plaintiffs' delay was due to their own inaction. ECF No. 5 at 9-21. As the Court  
11 dismisses the case for the reasons discussed *supra*, the Court declines to reach the  
12 remaining issues.

13 Accordingly, **IT IS HEREBY ORDERED:**

14 1. Defendants' Motion to Dismiss, **ECF No. 5**, is **GRANTED**.

15 2. The Stipulated Motion to Dismiss Defendants Loren K. Miller and  
16 Alejandro Mayorkas, **ECF No. 18**, is **GRANTED**.

17 3. Plaintiff's Complaint, **ECF No. 1**, is **DISMISSED** without prejudice.  
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1 The District Court Executive is directed to file this Order, enter judgment  
2 accordingly, provide copies to counsel, and **CLOSE THE FILE.**

3 DATED March 15, 2024.

4 *s/Mary K. Dimke*  
5 MARY K. DIMKE  
6 UNITED STATES DISTRICT JUDGE  
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